No. 01-932

IN THE

Supreme Court of the United States

CRATER CORPORATION,

Petitioner,

v.

LUCENT TECHNOLOGIES INC., AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AND UNITED STATES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF RESPONDENTS LUCENT TECHNOLOGIES INC. AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondents Lucent Technologies Inc., and American Telephone and Telegraph Co. are publicly traded companies on the New York Stock Exchange.

REASONS FOR DENYING THE PETITION

I.

The first three Questions Presented by the Petition relate to the "state secrets privilege" — an issue that was not decided by the Court of Appeals. That court's opinion said:

> "We conclude, however, that it is not necessary for us to address Crater's arguments concerning the state secrets privilege. The reason is that we believe that the issue of the privilege is irrelevant to the question that is before us on appeal . . . " (Pet. Apdx 18a).

This Court does not ordinarily grant review to consider issues not discussed by the court below. *Perry v. Thomas*, 482 U.S. 483, 492 (1987); *Street v. New York*, 394 U.S. 576, 582 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945). The opinion of the Court of Appeals creates no precedent concerning the state secrets privilege, and accordingly there is nothing for this Court to review relating to that issue.

In addition, Questions 1-3 are premised on a misdescription of the record in this case. The Secretary of the Navy filed a Declaration stating that the information sought by petitioner was classified as "Top Secret," and that petitioner's requested discovery "could be expected to cause extremely grave damages to national security" because requiring responses to petitioner's discovery "would, directly or indirectly, provide adversaries of the United States Government with information concerning . . . operations and programs . . . [that] are currently ongoing," and would "permit potential adversaries to adopt specific measures to defeat or otherwise impair

the effectiveness of those operations and programs" (Pet. Apdx 118a-119a).

The Secretary's Declaration also recited that it was "based on my personal consideration of the matter" and "on information provided to me in my official capacity, and on my evaluation of that information" (Pet. Apdx 119a, 117a). So petitioner's contention that the Secretary had insufficient information or provided inadequate detail when invoking the privilege is belied by the Declaration itself, as well as by the case law. *See Kasza v. Browner*, 133 F.3d 1159, 1169 (9th Cir.) (Secretary of Air Force need not explain why each requested item of information affected the national interest), *cert. denied*, 525 U.S. 967 (1998); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1142 (5th Cir. 1992) (Secretary of Navy could invoke privilege based on understanding of type of information plaintiffs would need to establish their claim), *cert. denied*, 507 U.S. 1029 (1993); *Ellsberg v. Mitchell*, 709 F.2d 51, 59 (D. C. Cir. 1983) (declaration asserting prejudice to national interest need not explain what interest consists of or how it might be damaged), *cert. denied*, 465 U.S. 1038 (1984).

Nor is there any basis for petitioner's assertion that the privilege was applied here to "bar discovery of relevant materials that do not constitute state or military secrets" (Pet. i). The district court's order specifically authorized the parties to "proceed with discovery on the issues of (1) whether [respondents] made, used, or sold the Accused Device . . . to or for anyone other than the United States of America, and (2) whether the United States Government gave its authorization or consent to [respondents] for their manufacture or use of the Accused Device" (Pet. Apdx 88a).

The Court of Appeals likewise rejected petitioner's characterization of the scope of the privilege applied by the district court:

> "The only information relevant to Crater's opposition to Lucent's motion was information of commercial use of the coupler by Lucent. The privilege, by definition, only barred discovery of evidence of *non-commercial* use of the coupler by Lucent. The fact the district court allowed the government to assert the privilege had no bearing on Crater's ability to discover evidence that would have created a genuine issue of material fact as to whether Lucent engaged in commercial activity regarding the coupler" (Pet. Apdx 19a).

Hence, questions 1-3 are simply not presented by this case.

II.

Questions 4 and 5 posit inappropriate conduct on the part of the district judge by reason of his entertaining *ex parte* explanations by a government lawyer concerning the sensitivity of the information being sought through petitioner's discovery requests. On the contrary, it is well accepted that the government can — and must — make its case for confidentiality outside of counsel's presence in order to avoid disclosing the very information it seeks to protect. *See United States v. Reynolds*, 345 U.S. 1, 8 (1953) (a court must "determine whether the circumstances are appropriate for the claim of privilege . . . without forcing a disclosure of the very thing the privilege is designed to protect").

Accordingly, courts have consistently recognized the propriety of *ex parte*, *in camera* proceedings for the

examination of the state secrets issue. *See, e.g., United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1260 (9th Cir. 1998), *cert. denied*, 120 S.Ct. 110 (1999); *Kasza*, 133 F.3d at 1169; *Bareford*, 973 F.2d at 1144-45; *United States v. Yunis*, 867 F.2d 617, 620 (D.C. Cir. 1989). Indeed, it has specifically been observed that participation by private counsel "carries with it serious risk that highly sensitive information may be compromised." *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978), quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975).

Petitioner's attempt to impute misconduct to the trial judge is therefore misguided, as is the suggestion that Judge Webber's impartiality might reasonably be questioned by reason of actions that were perfectly proper.

III.

Petitioner's Sixth Question Presented deals with the application of rules relating to summary judgment in this fact-specific context. It does not warrant this Court's attention.

Subpart (1) of the issue — relating to the affidavit of Paul Rominski that supposedly was "not based on the affiant's personal knowledge" — was not addressed by either lower court. The Court of Appeals' opinion summarized the status of this issue:

> ". . . [I]n ruling in favor of Lucent, the district court did not rule on the motion to strike the Rominski affidavit, stating that, in view of the discovery that had taken place, the issue was moot . . . . Under these circumstances, we have not considered the Rominski affidavit" (Pet. Apdx 12a).

Subpart (2) of Question 6 deals with evidence submitted with respondents' reply brief in the district court. The Court of Appeals found nothing irregular in the procedure used under the unique circumstances presented because (a) discovery was not authorized until after the motion and initial memorandum were filed, and (b) petitioner's response to the motion was filed after the discovery in question, so petitioner "was able to adequately address the evidence in its opposition brief" (Pet. Apdx 14a-15a).

To the limited extent that Question 6 is actually presented in this record, it arises in an esoteric factual context and, in any event, is insubstantial.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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